

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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In the Matter of )  
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)  
**Northrop Grumman Space & Mission** ) SAT-LOA-19970904-00080  
**Systems Corporation** ) SAT-LOA-19970904-00081  
) SAT-LOA-19970904-00082  
Application for Authority to Launch ) SAT-LOA-19970904-00083  
and Operate a Geostationary and Non- ) SAT-LOA-19970904-00084  
Geostationary Orbit Fixed Satellite )  
System in the Ka-Band. )  
)  
)  
and )  
)  
**contactMEO Communications, LLC** )  
)  
Application for Authority to Launch ) SAT-LOA-19971222-00222  
and Operate a Geostationary and Non- ) SAT-AMD-20040322-00057  
Geostationary Orbit Fixed Satellite ) SAT-AMD-20040719-00141  
System in the Ka-Band. )  
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**CONSOLIDATED REPLY**  
**TO OPPOSITIONS TO PETITIONS TO DENY**

EchoStar Satellite LLC ("EchoStar") hereby files this Consolidated Reply to the Oppositions to the Petitions to Deny the above-captioned applications, as amended, of Northrop Grumman Space & Mission Systems Corporation's Space Technology Sector ("NGST") and contactMEO Communications, LLC ("@contact") (collectively "*Applicants*") to operate geostationary orbit ("GSO") and non-geostationary orbit ("NGSO") Fixed Satellite Service ("FSS") satellites in the Ka-band. As previously stated, EchoStar's interest in this matter is acute; its applications for four similar (4) GSO FSS satellites were summarily denied by the

Commission and are subject of pending petitions for reconsideration.<sup>1</sup> EchoStar is also a licensee and applicant of several GSO satellites in the Ka-band that could be interfered with by NGSO operations in the primary GSO Ka-bands. EchoStar, therefore, is a party in interest in this proceeding.

In the Oppositions, both @contact and NGST argue that their GSO applications on file *today* are not similarly situated to EchoStar's Ka-band GSO applications when they were summarily denied by the Bureau.<sup>2</sup> What the Applicants fundamentally misunderstand, however, is that at the time the Bureau allowed them to provide additional technical information regarding NGSO/GSO sharing of the primary NGSO portions of the Ka-band, their applications were similarly situated to EchoStar's Ka-band GSO applications. In other words, rather than summarily denying their applications, as the Bureau did with respect to EchoStar's Ka-band GSO applications for failing to provide sufficient technical support regarding NGSO/GSO sharing, the Bureau provided the Applicants with a second chance to make such a technical showing. Such disparate treatment clearly violates the requirements of the Administrative Procedure Act as well as the fundamental rule that similarly situated entities should be treated the same.

NGST and @contact invoke procedural gymnastics to somehow differentiate the posture of EchoStar's GSO applications from those of the Applicants. In fact, none of the

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<sup>1</sup> *In the Matter of EchoStar Satellite LLC Application for Authority to Construct, Launch And Operate Geostationary Satellites in the Fixed-Satellite Service Using the Ka and/or Extended Ku-bands at the 83° W.L., 105° W.L., 113° W.L., and 121° W.L. Orbital Locations*, Petition for Reconsideration, filed Jun. 1, 2004 ("*EchoStar Petition for Reconsideration*").

<sup>2</sup> Neither applicant disputes the fundamental principle that similarly situated applicants should be treated alike. *See Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965) ("It is a basic premise of administrative law that the Commission must treat similarly situated parties alike, absent a legally sustainable reason to the contrary.").

applications can be distinguished on this basis. The Applicants assert that EchoStar's applications were accepted for filing and appeared on public notice, and that the Bureau then correctly applied its processing procedures, rules and policies to *deny* EchoStar's applications.<sup>3</sup> Conversely, they maintain that their applications were *dismissed* prior to appearing on public notice, and then subsequently *reinstated* with a request for additional information. This proves a lack of parity of treatment, however: Had the Bureau applied the same processing standards to EchoStar and the Applicants, it would either (a) have denied (or dismissed) all of the applications and not allowed @contact or NGST to supplement their applications with additional support for NGSO/GSO sharing in the Ka-band; or (b) have allowed all of the applicants, including EchoStar, to amend their technical showings. Indeed, EchoStar has proposed such an outcome in its pending Petition for Reconsideration in the matter of its own Ka-band GSO applications.<sup>4</sup>

The Applicants' arguments regarding the differences between their updated interference and sharing analyses and EchoStar's lack of such a showing also are to no avail.<sup>5</sup> Once again, these new technical showings were submitted only after the Bureau reinstated the above-captioned applications and requested additional information from the Applicants. It is precisely because the Bureau requested this information from the Applicants and not from EchoStar that the disparate treatment arises.

Applicants further maintain that the substantive explanations they submitted with their supplemental showings differentiate their applications from EchoStar's applications.

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<sup>3</sup> @contact Opposition, at 4-5; NGST Opposition, at 6-8.

<sup>4</sup> *In the Matter of EchoStar Satellite LLC Application for Authority to Construct, Launch And Operate Geostationary Satellites in the Fixed-Satellite Service Using the Ka and/or Extended Ku-bands at the 83° W.L., 105° W.L., 113° W.L., and 121° W.L. Orbital Locations*, Petition for Reconsideration, filed Jun. 1, 2004 ("*EchoStar Petition for Reconsideration*").

<sup>5</sup> @contact Opposition, at 5; NGST Opposition, at 6-8.

However, neither the substance of these explanations, nor their inclusion upon amendment, serve to differentiate the applications. Substantively, Applicants maintain that they explained how traffic would be switched between satellites in order to avoid harmful interference to other NGSO systems, whereas EchoStar merely stated that it would cease providing service in order to avoid an interference event.<sup>6</sup> This supposed discrepancy is nothing more than a twisting of the facts. EchoStar did not state in its application, as @contact maintains, that “EchoStar would cease providing service entirely during such times.”<sup>7</sup> Rather, EchoStar indicated that it would “immediately cease operations.”<sup>8</sup> In other words, EchoStar would only cease operations in the NGSO portions of the Ka-band that would be subject to such an in line interference event. Traffic would then be switched, just as is now being proposed by the Applicants, to other frequency bands or satellites -- it would not cease service to its customers altogether. In fact, EchoStar has stated all along that the applications it submitted were intended to “supplement and support EchoStar’s existing MVPD offerings.”<sup>9</sup>

Furthermore, the inclusion of the substantive explanations does not advance the arguments of @contact and NGST because they were not present at the time of the disparate treatment. On review of the @contact and NGST GSO applications, the Bureau initially

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<sup>6</sup> @contact Opposition, at 6; NGST Opposition, at 6.

<sup>7</sup> @contact Opposition, at 5.

<sup>8</sup> *In the Matter of EchoStar Satellite LLC Application for Authority to Construct, Launch And Operate Geostationary Satellites in the Fixed-Satellite Service Using the Ka and/or Extended Ku-bands at the 81° W.L., 83° W.L., 101° W.L., 105° W.L., 109° W.L., 113° W.L., 119° W.L., 121° W.L., and 123° W.L. Orbital Locations*, filed Aug. 27, 2003, at 15-16 (“EchoStar Applications”).

<sup>9</sup> *Id.* at 3; *EchoStar Petition for Reconsideration*, at 6-9.

dismissed,<sup>10</sup> and later reinstated them with a request for additional information.<sup>11</sup> Though absent from the reversal letters, the Bureau specifically noted in the dismissal letters that inclusion of more details regarding NGSO/GSO sharing in the Ka-band would be necessary for grant of the application. Had the Bureau not reversed its earlier decision to dismiss the applications, they would have been devoid of any technical NGSO/GSO sharing studies.

It is also incorrect to suggest, as @contact and NGST seem to be doing, that the Applicants and EchoStar were not similarly-situated because the Bureau found additional flaws in the Applicants' filings at an earlier stage in the review process than when EchoStar's applications were denied.<sup>12</sup> Applicants should not be able to improve their procedural positions by submitting applications containing more flaws. At the point in time that the Bureau denied or dismissed each of the applications, EchoStar, @contact, and NGST were all similarly-situated parties with respect to their GSO/NGSO sharing analyses and the disparate treatment afforded these parties by the Bureau has put them in vastly different procedural positions. This result simply cannot stand.

NGST separately argues that EchoStar is not similarly situated because it sought to change the rules to accommodate its applications while "NGST has designed its hybrid non-GSO/GSO system to comply with the existing GSO and non-GSO rules, seeking a waiver of the frequency allocation rules to the extent required to permit secondary, non-harmful interference

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<sup>10</sup> Letter from Thomas S. Tycz, FCC, to David M. Drucker, @contact, DA 04-1386, May 18, 2004 ("*@contact Dismissal Letter*"); Letter from Thomas S. Tycz, FCC, to Peter Hadinger, NGST, DA 04-1387, May 18, 2004 ("*NGST Dismissal Letter*").

<sup>11</sup> Letter from Thomas S. Tycz, FCC, to David M. Drucker, @contact, DA 04-1722, Jun. 16, 2004 ("*@contact Reversal Letter*"); Letter from Thomas S. Tycz, FCC, to Peter Hadinger, NGST, DA 04-1725, Jun. 16, 2004 ("*NGST Reversal Letter*").

<sup>12</sup> @contact *Dismissal Letter*, at 2; NGST *Dismissal Letter*, at 4.

geosynchronous operation in the 18.8-19.3 GHz bands.”<sup>13</sup> EchoStar and NGST both requested waivers of the existing Ka-band plan to accommodate their respective applications. EchoStar’s simultaneous petition to the Commission for a rulemaking proceeding to address the sharing issues raised by its applications has no bearing on whether a waiver of the rules should be granted pending the outcome of such a proceeding or whether the parties are similarly situated.<sup>14</sup> EchoStar was clear in both its applications and Petition for Rulemaking that the petition need not be resolved in order for the applications to be granted.<sup>15</sup>

Finally, Applicants argue that this is an inappropriate proceeding for EchoStar to request reinstatement of its own applications.<sup>16</sup> EchoStar is not using this proceeding to request any reinstatement of its applications. EchoStar has made such a request in its Petition for Reconsideration of the Bureau’s action denying its applications.<sup>17</sup> EchoStar is merely pointing out in this proceeding that due to the similarities between the respective proposals, the above-captioned applications cannot be granted unless and until the Bureau reinstates EchoStar’s GSO applications proposing use of the same NGSO Ka-band spectrum.

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<sup>13</sup> *NGST Opposition*, at 7. In addition, NGST continues to maintain that their satellites, unlike those of EchoStar, are not GSO-like satellites because they will communicate with and act in concert with their proposed NGSO satellites. *Id.* at 13. While such operations, in some circumstances, could avoid harmful interference to other NGSO satellite systems, this does not change the regulatory classification of these satellites. Satellites that are stationed in geostationary orbit are GSO-like satellites whether or not they are used in conjunction with NGSO satellites.

<sup>14</sup> *In the Matter of Petition for Rulemaking To Redesignate The 28.6-29.1 GHz (Earth-to-Space) and 18.8-19.3 GHz (space-to-Earth) Bands to Allow Geostationary Fixed-Satellite Service Operations On A Co-Primary Basis*, filed Aug. 27, 2003 (“*Petition for Rulemaking*”).

<sup>15</sup> *See, e.g., EchoStar Application*, at 4 (“The instant applications, however, are not predicated on any such rule changes.”).

<sup>16</sup> *@contact Opposition*, at 7-8.

<sup>17</sup> *EchoStar Petition for Reconsideration*.

For all of the above reasons as well as those set forth in EchoStar's Petitions to Deny, EchoStar respectfully requests that the Bureau treat EchoStar, @contact, and NGST as similarly-situated parties by either denying the GSO applications of @contact and NGST or reinstating EchoStar's GSO applications *nunc pro tunc* and processing both sets of applications according to the FCFS Queue. In any event, the Commission should institute a rulemaking proceeding to govern future sharing of NGSO-designated Ka-band spectrum by GSO satellites and GSO-designated spectrum by NGSO satellites.

Respectfully submitted,



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Pantelis Michalopoulos  
Philip L. Malet  
Lee C. Milstein  
**Steptoe & Johnson LLP**  
1330 Connecticut Avenue, N.W.  
Washington, D.C. 20036-1795  
(202) 429-3000

*Counsel for EchoStar Satellite LLC*

David K. Moskowitz  
**EchoStar Satellite LLC**  
9601 South Meridian Boulevard  
Englewood, CO 80112  
(303) 723-1000

Karen Watson  
Lori Kalani  
**EchoStar Satellite LLC**  
1233 20<sup>th</sup> Street, NW -- Suite 701  
Washington, DC 20036  
(202) 293-0981

Date: October 8, 2004

**CERTIFICATE OF SERVICE**

I, Lee C. Milstein, hereby declare that copies of the foregoing Reply to Oppositions filed by Northrop Grumman and contactMEO were sent on this 8th day of October, 2004 by hand delivery or United States Postal Service (indicated by \*) to the following:

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Thomas S. Tycz  
Satellite Division, International Bureau  
Federal Communications Commission  
236 Massachusetts Avenue, N.E.  
Suite 110  
Washington, DC 20002

David M. Drucker\*  
contactMEO Communications, LLC.  
2539 North Highway 67  
P.O. Box 348  
Sedalia, CO 80135

Peter Hadinger\*  
Northrop Grumman Space & Mission Systems Corp.  
Suite 2300  
1000 Wilson Blvd.  
Arlington, VA 22209

Norman P. Leventhal\*  
Stephen D. Baruch \*  
David S. Keir\*  
Leventhal Senter & Lerman PLLC  
Suite 600  
2000 K Street, N.W.  
Washington, DC 20006

David Kane\*  
Consulting Engineer  
5396 176<sup>th</sup> Place, S.E.  
Bellevue, WA 98006



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Lee C. Milstein